SUPREME COURT, U.S.
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No. 94-740

In The

Supreme Court of the United States

October Term, 1994

JEAN WILSON,

Petitioner,

v.

CENTRAL FREIGHT LINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner Wilson ("Wilson") failed to establish a prima facie case of age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634?

2. Whether the District Court and Fifth Circuit Court of Appeals correctly found that Wilson failed to produce competent summary judgment evidence upon which a reasonable finding could be made that Respondent Central Freight Lines, Inc.'s stated reason for eliminating Wilson's position is a pretext for age discrimination?

3. Whether the Fifth Circuit Court of Appeals correctly determined that Wilson waived any right to challenge the District Court's considerable discretion to exclude her belated summary judgment evidence?

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BRIEF IN OPPOSITION

Respondent, Central Freight Lines, Inc. ("Central" or the "Company"), requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition") filed by Jean Wilson ("Wilson").

This case involves Wilson's failure to demonstrate that Central's nondiscriminatory business reason for eliminating her Office Manager position was a pretext for age discrimination. The Petition should be denied because: (i) Wilson failed to establish a prima facie case of age discrimination under the ADEA; (ii) the lower courts correctly determined that Wilson failed to produce any

evidence that Central contrived its nondiscriminatory business reason and that her age was the real reason for her job elimination; and (iii) the Fifth Circuit Court of Appeals properly determined that Wilson waived any right to challenge the District Court's considerable discretion to exclude her late-filed summary judgment evidence. Plainly, the Fifth Circuit's decision does not conflict with decisions from other circuit courts, nor is there any issue of national importance involved in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals, the District Court's opinion granting Central's Motion for Summary Judgment, and the District Court's order denying Wilson's Motion for New Trial are reproduced at Appendix 1 of the Petition.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on June 21, 1994. Wilson invokes this Court's jurisdiction under 28 U.S.C. § 1254(i).

STATUTORY PROVISIONS

The statute at issue in this case is the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), which provides in relevant part:

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

and § 631(a), which states:

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

STATEMENT OF THE CASE

Wilson worked as the Office Manager at Central's Longview, Texas terminal. On August 24, 1990, Central eliminated her job. Wilson filed suit on December 6, 1991, claiming that she was discharged because of her age in violation of the ADEA, 29 U.S.C. §§ 621-634. Central denied that Wilson's age played any role in the Company's decision to eliminate her position. Rather, as Central has maintained all along, Wilson was let go as part of an economically motivated job elimination.

A. Proceedings Below.

After considerable time for discovery, Central filed its Motion for Summary Judgment in late October 1992, contending that Wilson could not raise a triable issue of fact on each element of her age discrimination claim. Wilson received three extensions of time to respond to the dispositive motion, filing her response on February 16, 1993. In its reply to Wilson's response, Central demonstrated that Wilson had failed to present any evidence

that the Company's economic reason for eliminating her position was false and that her age was the real reason for her discharge. Central also demonstrated that Wilson's so-called "statistical" evidence was unreliable and irrelevant.

Agreeing with Central's position, the District Court granted the Company's summary judgment motion and concluded that Wilson failed to produce competent evidence to support the prima facie case and pretext for discrimination elements of her claim. (Dist. Ct. op. at 3-12).[1] The District Court rejected Wilson's two categories of summary judgment evidence, reasoning that (i) Central did not apply its layoff by seniority or "roll back" policy in favor of younger co-workers and (ii) Wilson's statistical evidence did not raise any inference of age discrimination. (*Id.* at 7-12).

Dissatisfied with the District Court's decision, Wilson filed a "Motion for New Trial," contending that her expert's opinion raised a triable issue of fact. After Central filed its response to the new trial motion, Wilson, *for the first time*, attempted to introduce seven belated affidavits ("Belated Affidavits") from former co-workers.[2]

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[1] References to the district court's unpublished memorandum opinion, as reproduced in Petitioner's Appendix 1, are denoted by the abbreviation "Dist. Ct. op.," followed by the page number in the memorandum opinion.

[2] Wilson's attempt to slip new evidence into the record is appalling. She began filing the Belated Affidavits *after* she filed her new trial motion. She submitted the affidavits with her Reply to Defendant's Response to Plaintiff's Motion for New Trial. Wilson also attempted to file three more affidavits at the August 30, 1993 hearing on her new trial motion, and one more

Central moved to strike the Belated Affidavits. At the August 30, 1993 hearing on Wilson's new trial motion, the District Court granted Central's motion to strike three of the affidavits that were submitted for the first time at the hearing. Likewise, in a separate order denying Wilson's new trial motion, the District Court concluded that it would not reopen the summary judgment record and consider the remaining Belated Affidavits. In the District Court's view, the information in the Belated Affidavits was available to Wilson long before the summary judgment pleadings had closed. Alternatively, the District Court concluded that even if it had considered the Belated Affidavits, the evidence was insufficient to raise any inference of age discrimination – the evidence was irrelevant to Wilson's claim, remote in time, and arose under circumstances different from her discharge.

B. Statement Of Facts.

The facts of this case are set out succinctly and accurately in the Fifth Circuit's opinion. (Ct. App. op. at 2).[3] By stark contrast, the prolonged statement of facts on pages 6-24 of the Petition contains numerous statements that are immaterial, that distort the summary judgment record, and that are not properly part of the record.

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after the hearing. In yet another effort at deception, she has now attempted to submit a "job posting" dated after the Fifth Circuit issued its opinion in this case. *See* Appendix 2 to the Petition.

[3] References to the Fifth Circuit's unpublished opinion, as reproduced in Appendix 1 of the Petition, are denoted by the abbreviation "Ct. App. op.," followed by the page number.

Rather than burden the Court by repeating all the material, uncontroverted facts in the summary judgment record, Central recounts the essential facts pertinent to the lower courts' decisions.[4]

The Parties

Central is a trucking company headquartered in Waco, Texas. The Company operates approximately 73 terminals across Texas, Oklahoma, New Mexico, Arkansas and Tennessee. In 1972, Wilson began work with Central as an Office Clerk at its Longview, Texas terminal. She later became a Cashier, checking in drivers and receiving paper work and payments from Central's customers. A few years later, Central promoted Wilson to the Office Manager position at the Longview terminal. In that position, she supervised the terminal's clerical employees and prepared credit union forms. She also performed personnel duties, such as preparing equal employment opportunity summaries, assisting the terminal employees in submitting insurance forms, preparing new employee forms and termination notices, and filling in for office employees during their lunch breaks and vacations.

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[4] Wilson's "fact statement" and other sections of her brief contain information derived largely from the Belated Affidavits and "job postings" – evidence that was *never* part of the summary judgment record in the courts below. *See, e.g.*, Petition at 9-10, 12-24, 32-33, 38-39, 51-52, 63 and Appendix 2 (attaching and restating information in 1993 and 1994 "job postings" – *documents that were never part of the record on appeal*).

Decline In Business At The Longview Terminal

Central's level of business declined significantly in the late 1980's. In addition to increased competition, levels of freight declined substantially and, in turn, Central's economic position suffered dramatically. At the same time, Wilson's supervisory responsibilities were affected by the downturn in demand for Central's services. When Wilson assumed the Office Manager role, she supervised up to eleven office employees. However, when Central eliminated Wilson's job in August 1990, the Longview terminal had only three full-time clerical employees and one part-time employee. After Central let Wilson go, the Longview terminal had only three full-time clerical employees.

Decision To Eliminate Wilson's Position

To address the declining business conditions, Central adopted a plan to restructure and streamline its operations. As an integral part of that plan, Central eliminated various positions where the remaining management and staff could effectively assume additional responsibilities. The majority of position eliminations and restructuring occurred at Central's corporate office in Waco, Texas. Several of the Company's larger terminals, such as Dallas and Houston, also experienced substantial reductions and restructuring. Mid-size terminals, such as the one in Longview, were affected by the restructuring based on the specific circumstances at each terminal.

In August 1990, Central decided to abolish the Longview terminal's Office Manager position. At that time, the

other management employees at the terminal were Weldon Mangham, Terminal Manager, and M.L. Morris, Assistant Terminal Manager. Central's decision to eliminate the Office Manager position was based on several factors. First, terminal management was substantially overstaffed. In the early 1980's, Wilson supervised as many as 11 office employees. By 1990, however, that number had declined to three full-time and one part-time office clerical. Second, Central knew that Mangham, the Longview Terminal Manager, intended to retire at the end of 1990; therefore, Morris was needed to assume the Terminal Manager position. Given the decline in workload and substantial decrease in office staff and other personnel, Central determined that Morris could assume all management responsibilities at the Longview terminal.

Elimination of Wilson's Position

On August 24, 1990, Central eliminated the Longview terminal's Office Manager position. Weldon Mangham informed Wilson about her discharge in a private meeting in Mangham's office. Central did not have any available job openings at the terminal when it eliminated Wilson's job. Specifically, the Cashier position was not vacant when Central eliminated Wilson's position. Nancy Goode was employed as the Cashier and had been so employed for over three years. Mangham retired in December 1990 and, at that time, Morris became the Terminal Manager and performed all management duties at the Longview terminal. When Morris assumed the Terminal Manager duties, Central also eliminated the Longview Assistant Terminal Manager position.

Layoffs By Seniority

Central applied layoffs by seniority to rank and file hourly employees such as dockworkers and drivers. By comparison, when eliminating a salaried manager's position, particularly where there was only one incumbent in the position, the Company did not apply seniority or bumping rights. Central's layoff by seniority policy did not apply to the *elimination* of a job position. Wilson was not laid off. Her position was eliminated and, as a result, she was terminated from employment.

Things changed in 1991. Central implemented a new transfer policy and, under that policy, the Company transferred one individual who was the sole employee at the Bonham, Texas terminal (classified as the Bonham Terminal Manager) to an hourly position. During the same year, Central also transferred a dock trainer at the Dallas terminal to the Sulphur Springs terminal as a dock loader. Wilson did not offer any evidence regarding the ages of the two transferred employees.

REASONS FOR DENYING THE WRIT

This case should not be heard. No "special and important reasons" exist for exercising the Court's discretion to review the Fifth Circuit's decision. Sup. Ct. R. 10.1 (West 1994). The courts below fully considered the summary judgment evidence and correctly decided that a jury could not reasonably have found that Central fabricated its reason for eliminating Wilson's position and that her age was the real reason for her discharge. The Petition represents Wilson's desperate attempt to rely on belated

summary judgment evidence – none of which was properly a part of the summary judgment record in the courts below. Before the Fifth Circuit, Wilson did not challenge the District Court's considerable discretion to exclude the seven Belated Affidavits she filed *after* the District Court had granted Central's summary judgment motion. The Fifth Circuit's decision raises no conflict among the courts of appeals, and the Petition does not raise important issues of federal law or public policy warranting this Court's plenary attention.

I. THE FIFTH CIRCUIT PROPERLY APPLIED *ST. MARY'S HONOR CENTER v. HICKS* IN THE SUMMARY JUDGMENT CONTEXT

In a tribute to conclusory reasoning, Wilson asserts that the Fifth Circuit misapplied this Court's decision in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). (Petition at 3). Wilson offers no explanation for her global conclusion. Rather, on pages 25-65 of the Petition, she simply repeats her disjointed and verbose arguments already rejected by the courts below. (Petition at 25-65). Wilson presents no compelling rationale for granting a writ of certiorari.

A. Wilson Failed To Establish A Prima Facie Case.

Despite Wilson's failure to offer any reasoned explanation for this Court to exercise discretionary review, Central responds to the scattered points raised in the Petition. Initially, Wilson ignores her threshold burden to establish a prima facie case of age discrimination in the

job elimination context. In *Hicks*, this Court refined and clarified the burdens of proof in a discrimination case. These burdens are:

- Plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination.

- If the plaintiff succeeds in proving a prima facie case, the defendant must *articulate* some legitimate, nondiscriminatory reason for the employee's discharge.

- If the defendant can articulate a nondiscriminatory reason for its adverse employment action, then the presumption raised by the prima facie case disappears and plaintiff must prove *both* that the nondiscriminatory reason *was false, and that discrimination was the real reason.*

Id. at 2747-49, 2751-53 & n.4 (emphasis added). *See also Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973). Wilson's ultimate burden of proving intentional age discrimination remains with her at all times and never shifts to Central. *Hicks*, 113 S. Ct. at 2747-48; *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993) (liability depends on whether age actually motivated the employer's decision).

Wilson does not challenge the Fifth Circuit's three-part test for establishing a prima facie case in a job elimination case. Under this test, Wilson must prove three elements: (i) she was within the protected class and was

discharged; (ii) she was qualified to assume another position at the time of her discharge; and (iii) there is evidence from which a factfinder might reasonably conclude that Central, in reaching its conclusion, intended to discriminate against Wilson on account of her age. *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1314-15 (5th Cir. 1986). Regarding the third element, the Fifth Circuit requires evidence from which a factfinder might reasonably conclude that the employer consciously refused to consider retaining or relocating the plaintiff because of her age, or that the employer regarded her age as a negative factor in its consideration. *Williams*, 656 F.2d at 130.

Wilson failed to produce any evidence of discriminatory treatment to satisfy the third element of her prima facie case. As the lower courts correctly observed, Wilson was never replaced by a younger person, nor could she present any admissible evidence showing that Central treated her less favorably than younger persons in similar job positions. (Dist. Ct. op. at 6-7, 11-12; Ct. App. op. at 10). Since Wilson failed to establish a prima facie case of age discrimination, this Court need not reach any of the "pretext" issues raised in the Petition. Thus, the Petition should be denied.

B. Wilson Misinterprets Her Pretext For Discrimination Burden.

Nevertheless, even if Wilson could have cleared her prima facie case hurdle, the lower courts properly concluded that she could not dodge the "pretext for discrimination" element of her claim. An employer's burden to

rebut a prima facie case under the ADEA is slight. The employer must produce some evidence that the employee was terminated for a nondiscriminatory reason. *Hicks*, 113 S. Ct. at 2747; *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. The employer "need not persuade the court that it was actually motivated by [its] proffered reasons," *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094, nor must it prove the "absence of a discriminatory motive." *Board of Trustees v. Sweeney*, 439 U.S. 24, 25, 99 S. Ct. 295 (1978). *See also Hicks*, 113 S. Ct. at 2749 (prima facie presumption "simply drops out of the picture" once employer articulates nondiscriminatory explanation).

Central easily cleared this impediment by articulating a nondiscriminatory business reason for eliminating Wilson's Office Manager position. After a dramatic decline in business caused by adverse market conditions, Central concluded that it no longer needed an Office Manager at the Longview terminal. Central determined that Wilson's managerial duties could be assumed by the Assistant Terminal Manager and Terminal Manager. Given Central's stated nondiscriminatory reason, Wilson was required to produce competent evidence that the stated reason was a pretext for age discrimination. Wilson, however, could not overcome this insurmountable obstacle to her claim.

The Pretext For Discrimination Analysis

In *Hicks*, this Court stated that once the defendant-employer has *articulated* a nondiscriminatory reason for its adverse employment action (here, the job elimination),

the plaintiff-employee must prove *both* that the non-discriminatory reason was false, *and* that discrimination was the real reason. *Id.* at 2747-49, 2751-53 & n.4. The holding in *Hicks* is abundantly clear – discrimination plaintiffs are not entitled to judgment as a matter of law if they prove that a defendant's articulated reason for an employment practice is untrue. 113 S. Ct. at 2749. The Fifth Circuit applied this uncomplicated analysis in the summary judgment context and this Court's decision needs no clarification. (Ct. App. op. at 10-11). Far from eliminating confusion, a grant of certiorari in this case would actually engender uncertainty that presently does not exist.

Wilson Relies Solely On Dictum From The Hicks Decision

Wilson's Petition creates confusion. Relying on *Hicks*, Wilson asserts that she need only cast doubt on the credibility of Central's stated reason for her discharge to raise a triable issue on her age discrimination claim. (Petition at 34, 53). She misreads the *Hicks* decision. Wilson's argument about this Court's intent focuses on a passage that is dictum to the actual decision in *Hicks*, and the inference she manufactures and draws from the passage distorts the Court's actual holding. That passage reads:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

Hicks, 113 S. Ct. at 2749.

This isolated passage offers no hope for Wilson's age discrimination claim. First, the passage is dictum because it does not bear directly on the precise issue then before the Court: whether a plaintiff automatically wins by proving the falsity of an employer's asserted reasons for its actions. Second, Wilson's analysis of the passage is taken out of context. The passage does not support Wilson's strained conclusion that a genuine issue for trial under the ADEA exists whenever the plaintiff establishes a prima facie case and then counters the employer's stated reason for discharge with non-credible assertions. (Petition at 34, 53). When read together with the remainder of the opinion, the quoted passage merely states that, in limited cases where the employer's stated reasons are obviously contrived, not simply incorrect or unwise, a plaintiff's evidence of pretext may combine with her prima facie case to permit the factfinder to infer intentional discrimination. While this may be enough to support a pro-plaintiff judgment, there must necessarily be a finding of discrimination. *See Hicks*, 113 S. Ct. at 2749 n.4.

In Wilson's haste to manufacture confusion regarding the scope of this Court's holding in *Hicks*, she overlooks a significant, coordinate passage from the decision – a passage which effectively blunts her argument that discrediting the employer's reason entitles her to a jury trial:

> [T]here is nothing whatever inconsistent between this statement [that rejection of a defendant's reasons permits the inference of discrimination] with our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to *dis*believe the employer," *infra*, at

> 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

113 S. Ct. at 2749 n.4 (emphases in original).

A complete reading of the *Hicks* opinion buttresses the Fifth Circuit's conclusion that Wilson must demonstrate triable issues of both pretext and discrimination before proceeding to trial. *See Bodenheimer v. PPG Indus.*, 5 F.3d 955, 957-59 (5th Cir. 1993) (holding that plaintiff must raise triable issue that stated reason was pretext for age discrimination). *See also Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994) (same); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 843 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994) (same). The *Hicks* majority admonished that a "reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." 113 S. Ct. at 2752 (emphasis in original); *see also id.* at 2754 ("it is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.") (emphasis in original).

Further, the *Hicks* majority cast doubt on the validity of dicta in *Burdine* which indicated that a plaintiff could prove discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence." 113 S. Ct. at 2752 (citing *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981)). Referencing numerous inconsistencies between this statement and other Supreme Court pronouncements in *Burdine* and elsewhere, this Court concluded

"that the dictum at issue here must be regarded as an inadvertence, to the extent it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent." *Id.* at 2753. As a result, Wilson could have bolstered any proffered evidence of age discrimination by demonstrating that Central's reasons were unworthy of credence, but, at the end of the day, she was required to produce some proof (circumstantial or direct) of discrimination. *See id.* at 2749 n.4 ("even though [as we say here] rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*") (emphasis in original). As the lower courts properly determined, Wilson came up short.

In summary, by allowing a plaintiff to proceed to trial without raising a genuine issue of material fact regarding the ultimate question of discrimination would, in effect, treat discrimination differently from other cases involving ultimate questions of fact. This rationale would permit disproof of a defendant's reasons to suffice as an independent means of proving discriminatory intent – precisely what the *Hicks* Court rejected. Therefore, the Fifth Circuit properly applied *Hicks* in the summary judgment context. (*See* Ct. App. op. at 10-11).

C. The Fifth Circuit's Decision Does Not Conflict With The Application Of *Hicks* In Other Circuits.

Without any explanation, Wilson also contends that the Fifth Circuit's application of *Hicks* "directly conflicts with five other Circuit Courts." (Petition at 3). She does

not bother to explain how the decisions conflict with one another – apparently leaving that task to the Court's imagination. The so-called "conflict" is illusory.

As the *Hicks* court aptly explained, in the pretext phase of the burden-allocation scheme, Wilson must produce competent evidence that Central's articulated reason was contrived to mask age discrimination, not merely mistaken or unreasonable decisions. She has failed to do so. The decisions cited by Wilson are not to the contrary. *See Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 141-42 (2d Cir. 1993) (concluding that *Hicks* did not impact the case because plaintiff introduced direct evidence of retaliation); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170 (2d Cir. 1993) (reiterating the *Hicks* "pretext for discrimination" analysis and concluding that application of ADEA to particular facts did not pose serious risk of violating Establishment Clause of the First Amendment to U.S. Constitution); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513-14 (7th Cir. 1993) (holding that there was sufficient evidence to support jury's conclusion that Transit Authority had custom or policy of terminating white per diems, and that plaintiff was terminated on account of his race); *Washington v. Garrett*, 10 F.3d 1421, 1533-34 (9th Cir. 1993) (noting that plaintiff had presented sufficient evidence that similarly situated white persons were treated more favorably and some direct evidence of race discrimination); *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 920-21 (11th Cir. 1993) (noting that plaintiff produced sufficient evidence to establish "causal nexus" element on ADEA retaliation claim).

II. THE LOWER COURTS' DECISIONS ARE CONSISTENT WITH THE HOLDING AND DICTA IN *HICKS*

In her final argument to support the Petition, Wilson maintains, again without any explanation, that the Fifth Circuit has "departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (Petition at 5). Her rhetoric is meaningless. Wilson does not point to any aspect of the opinion where the Court of Appeals departed from the "accepted and usual course of judicial proceedings." As the Fifth Circuit properly concluded, *Wilson* departed from well-recognized summary judgment principles by attempting to rely on Belated Affidavits *after* the District Court granted Central's summary judgment motion. (Ct. App. op. at 9).

The Fifth Circuit also concluded that Wilson did not challenge the District Court's considerable discretion to exclude the Belated Affidavits. *Id.* Since Wilson's late-filed evidence was properly excluded, and she failed to challenge the District Court's considerable discretion to exclude the evidence, she cannot challenge that decision for the first time before this Court. *See EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 25, 106 S. Ct. 1678, 1681 (1986) (Supreme Court will not address issues not raised in the Court of Appeals).[5]

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[5] *See, e.g.*, Petition at 9-10 (referencing office manager at a different location as "much younger" than Wilson and a "younger replacement" for Wilson), and 12-24 (restating testimony in belated affidavits and job postings). Wilson also refers to the excluded evidence in the "summary of argument" and "argument" sections of the Petition. *See, e.g.*, Petition at 25-26,

In the end, Wilson's only "evidence" to buttress her age discrimination claim was:

- Central did not apply its "layoff by seniority" policy to allow her to "roll back" to the Cashier position at the Longview terminal.
- Her expert's statistical evidence.

Alone or in combination, Wilson's so-called "evidence" did not entitle her to a jury trial.

A. Wilson Failed To Raise A Triable Issue Based On Central's Application Of Its "Roll Back" Policy.

Rejecting Wilson's age discrimination claim, the lower courts correctly concluded that she failed to produce any evidence that Central contrived its non-discriminatory business reason for eliminating her job and that her age was the real reason for her discharge. (Dist. Ct. op. at 7-12; Ct. App. op. at 9-11). According to Wilson, Central's past policy for dealing with business declines was to lay off employees based on seniority and to "roll back" senior employees into positions previously held by employees with less seniority. Applying that analysis, Wilson asserted that she should have been "rolled back" to the Cashier position and that she was not

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32-33, 36-38, 51-53, and 63). Likewise, Wilson attempts to deceive this Court by trying to slip new evidence into the record. She now attaches to the Petition a July 21, 1994 job posting that was not part of the summary judgment record before the lower courts. *See* Petition, Appendix 2. This type of conduct by Wilson's attorney is sanctionable and represents counsel's futile attempt to avoid a result he does not like.

a beneficiary of Central's roll-back policy because of her age. The lower courts appropriately rejected that argument, reasoning that Central's refusal to apply the policy to Wilson was not a pretext for age discrimination. (Dist. Ct. op. at 7-9; Ct. App. op. at 11).

First, Weldon Mangham, the Longview Terminal Manager, distinguished Wilson's job elimination from the circumstances involving past layoffs at Central. Wilson's position was totally eliminated and, as a result, her job elimination was not subject to the roll-back policy. Wilson ignores this distinction and makes the unsupported assertion that her job elimination was somehow a pretext for a "layoff." Mangham, however, clearly distinguished a job elimination from a layoff – only a layoff triggered any "roll-back" based on seniority.

Second, Wilson asserted that Central has taken three different positions concerning application of the "roll-back" policy. She is seriously mistaken. Central's uncontested summary judgment evidence demonstrated that layoffs by seniority only applied by job classification to hourly employees, not to management and salaried employees. Wilson, however, claims that Central transferred salaried and managerial employees to hourly positions. She misreads the uncontested facts. Central transferred two employees under a new transfer policy implemented in 1991 – the year *after* Wilson's termination. The District Court correctly concluded that the two transfers were not relevant to Wilson's claim because they occurred several months, if not longer, after her discharge, and they occurred under a transfer policy, not a layoff or workforce reduction policy. Consistent with Central's position throughout this case, the Company did

not "roll back" managerial employees into hourly positions during the 1990 reorganization that affected Wilson.

In any event, the Fifth Circuit properly determined that Wilson proffered no evidence concerning the ages of the two transferred employees; thus, her evidence is "not particularly probative of whether Central discriminated against Wilson on account of her age." (Ct. App. op. at 11). The lower courts correctly reasoned that Wilson's "layoff by seniority" argument failed to raise any triable issue on her age discrimination claim.

B. The Lower Courts Properly Concluded That Wilson's Statistical Evidence Failed To Raise Any Inference Of Discrimination.

Wilson also relied on unreliable and irrelevant "statistics" to support her age discrimination claim.[6] The lower courts properly concluded that the statistical analysis by Wilson's expert did not raise any inference of age discrimination. (Dist. Ct. op. at 9-11; Ct. App. op. at 11-14). Since the Petition simply repeats the statistical

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[6] In her summary judgment response, Wilson referenced the "disparate impact" theory of discrimination; however, she never asserted a separate disparate impact claim in her Amended Complaint. She used the "statistical" evidence solely to support her disparate treatment claim. Moreover, Wilson never identified "any facially neutral practice" that had an adverse impact on older workers. Significantly, this Court has not recognized the disparate impact theory in an age discrimination case. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993); *Hiatt v. Union Pac. R.R. Co.*, Nos. 93-CV-0209-B, 93-CV-0210-B, 1994 WL 410107, *13-15 (D. Wyo. Aug. 3, 1994) (refusing to apply disparate impact theory to ADEA case).

arguments already rejected by the courts below, Central will not burden this Court with further argument. (*See* Petition at 56-64).

CONCLUSION

Wilson's Petition contains a conspicuous void: she did not mention the District Court's exercise of its considerable discretion to exclude her Belated Affidavits from the summary judgment record. Instead, she hoped to slip the inadmissible evidence by this Court. She failed.

Wilson had over ten months to conduct discovery and had obtained three extensions of time to submit her summary judgment response, yet she failed to proffer any probative evidence of age discrimination. Wilson's deceptive attempt to rely on excluded evidence reveals the baseless nature of her age discrimination claim. Additionally, the courts below appropriately concluded that Wilson failed to present any evidence to raise a triable issue on the prima facie case and pretext elements of her age discrimination claim. In a futile effort to cling to a metaphor, Wilson asks this Court to find a "thin vapor" of age discrimination emanating from her "evidence," yet she fails to reveal even a whiff of discrimination floating in the air.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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